

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANDREW WESTON)	
Claimant)	
VS.)	
)	Docket No. 231,589
AMERICAN LINEN SUPPLY COMPANY)	
Respondent)	
AND)	
)	
CONTINENTAL CASUALTY)	
INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the undated Preliminary Order, which was filed with the Division of Workers Compensation on June 7, 2002, entered by Assistant Director Kenneth J. Hursh.

ISSUES

This claim returns to the Board for a second time. By its Order dated May 29, 2002, the Board reversed a February 28, 2002 Preliminary Order in which the Assistant Director found claimant had failed to serve timely written claim upon respondent. Accordingly, the Board remanded the claim to the administrative law judge and/or the Assistant Director to address the remaining issues in claimant's request for preliminary hearing benefits.

The Assistant Director then entered the undated Preliminary Order, which is the subject of this appeal, concluding the June 1996 accident caused a mild traumatic brain injury that had resolved. In addition, the Assistant Director determined claimant had failed to prove that his increased seizure activity following the June 1996 accident was related to the accident. Accordingly, the Assistant Director denied claimant's request for temporary total disability benefits and a request for medical treatment.

Claimant contends the Assistant Director erred. Claimant first argues the Assistant Director overturned the Board's implicit findings regarding claimant's incapacity that were

made in determining the written claim issue in the Board's May 29, 2002 Order. Next, claimant argues the Assistant Director did not retain jurisdiction over this claim after entering the initial preliminary hearing Order and, therefore, the Board's order for remand should have been heard by the administrative law judge who was initially assigned to this claim. Claimant argues he had scheduled a preliminary hearing with the administrative law judge to address the issues on the remand but the Assistant Director's latest Preliminary Order was issued before the matter could be heard. Accordingly, claimant requests the Board either to reverse the latest Preliminary Order or to set aside the Order and remand the claim to the administrative law judge.

Conversely, respondent and its insurance carrier contend this appeal should be dismissed or the Preliminary Order affirmed. First, they argue this appeal does not address any of the jurisdictional issues that are subject to review from a preliminary hearing order. Second, they argue the Assistant Director's review and analysis of the evidence is reasonable and well-supported by the record.

The issues before the Board on this review are:

1. Does the Board have jurisdiction to review the latest Preliminary Order entered by the Assistant Director?
2. If so, is claimant entitled to the temporary total disability benefits and the medical treatment that he now requests?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

The principal issues on this appeal are the nature of the injuries that claimant sustained in his June 27 or 28, 1996 work-related accident and whether those injuries now require medical or psychological treatment or entitle claimant to receive temporary total disability benefits.

The issues raised by claimant in this appeal are not subject to review from a preliminary hearing order.

This is an appeal from a preliminary hearing order. Accordingly, the Board's jurisdiction to review preliminary hearing findings is limited. At this stage of the claim, not every alleged error is subject to review. Generally, the Board can review preliminary hearing orders in which an administrative law judge exceeded his or her jurisdiction. K.S.A. 2001 Supp. 44-551. The Board also has specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are:

- (1) whether the worker sustained an accidental injury,
- (2) whether the injury arose out of and in the course of employment,
- (3) whether the worker provided timely notice and timely written claim, and
- (4) whether certain other defenses apply.

The term “certain defenses” refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.¹

The issues whether a worker needs ongoing medical treatment or whether the worker satisfies the definition of being temporarily and totally disabled are not jurisdictional issues listed in K.S.A. 44-534a that are subject to review from a preliminary hearing order. Those issues do, however, comprise questions of law and fact over which an administrative law judge (or an assistant director acting as an administrative law judge) has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.²

Claimant argues the Board’s May 29, 2002 order for remand should have been heard by the administrative law judge who was initially assigned this claim rather than the Assistant Director. The Board is unaware of any provision in the Workers Compensation Act that provides an injured worker the right to object to which judge, or which assistant director acting as an administrative law judge, decides his or her claim upon an order for remand. Accordingly, claimant’s contention that this claim should have returned to the administrative law judge for additional proceedings is without merit.

As provided by the Act, preliminary hearing findings are not final but subject to modification upon a full hearing of the claim.³ Additionally, claimant may request another preliminary hearing to introduce additional evidence regarding the nature of claimant’s injuries and the need for medical treatment.

¹ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

² *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

³ K.S.A. 44-534a.

WHEREFORE, the Board dismisses claimant's appeal.

IT IS SO ORDERED.

Dated this ____ day of August 2002.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Gary K. Albin, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Kenneth J. Hursh, Assistant Director
Director, Division of Workers Compensation